

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
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Applications of Verestar, Inc. (Debtor-In-)
Possession) and Verestar Networks, Inc.)
(Debtor-In-Possession) for Consent to)
Assignment of Licenses and Authorizations)
To SES AMERICOM, Inc.)

IB Docket No. 04-174

REPLY OF GWTP INVESTMENTS, L.P.

GWTP Investments, L.P.

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REPLY OF GWTP INVESTMENTS, L.P.

GWTP Investments, L.P. (“GWTP”), by its attorneys and pursuant to the Commission’s May 26, 2004 *Public Notice*,¹ as amended June 9, 2004,² hereby replies to the Opposition of Verestar, Inc. (Debtor-in-Possession), Verestar Networks, Inc. (Debtor-in-Possession) (collectively, “Verestar”) and SES AMERICOM, Inc. (“SES Americom”), a wholly-owned subsidiary of SES Global, Inc. (“SES Global”) (Verestar, SES Americom and SES Global, collectively, the “Applicants”) that was filed on July 6, 2004 in the above-captioned proceeding.

I. Summary

The Applicants object to GWTP’s request that the Commission dismiss or deny their applications (the “Applications”) during the pendency of the civil litigation regarding

¹ *Public Notice*, Verestar Inc. (Debtor-in-Possession), Verestar Networks, Inc. (Debtor-in-Possession) and SES Americom, Inc. Seek FCC Consent to Assign and/or Transfer Control of Licenses and Authorizations, DA 04-1502, IB Docket No. 04-174 (rel. May 26, 2004).

² *Public Notice*, Verestar Inc. (Debtor-in-Possession), Verestar Networks, Inc. (Debtor-in-Possession) and SES Americom, Inc. Seek FCC Consent to Assign and/or Transfer Control of Licenses and Authorizations. DA 04-1696, IB Docket No. 04-174 (rel. Jun. 9, 2004).

Verestar Asset Pool 5 (“Brewster Teleport”) and Asset Pool 6 (“Cedar Hill Teleport”).³ As GWTP explained in its Petition, continuing the Commission’s review of the Applications in their present form will prejudice GWTP.⁴ Moreover, because the Applications are substantially flawed, continued review by the Commission would be contrary to the public’s interest in administrative efficiency.⁵

The Applicants invite the Commission to forego a thorough review of the proposed assignment of Verestar’s licenses to SES Americom and merely take on faith that the transaction will benefit the public interest. Presumably, the Applicants believe that it is more efficient for the Commission to review a flawed application than to require the flaws to be cured. The Applicants argue that the Commission should simply presume that SES Americom’s acquisition of additional U.S. communications assets does not warrant scrutiny because the company has previously been permitted to exceed foreign ownership limitations in connection with its acquisition of other U.S.-based communications assets.⁶

The Commission should decline the Applicants’ invitation to abandon its statutory duties. They have provided no reason why the Commission should not perform a thorough

³ See Opposition to Petition to Dismiss or Deny, Verestar, Inc., Verestar Networks, Inc and SES Americom, Inc., IB Docket No. 04-174, Jul. 6, 2004, at 1,5. (“*Opposition*”). See also, Petition to Dismiss or Deny of GWTP Investments, L.P., IB Docket No. 04-174, June 25, 2004, at 7-8. (“*Petition*”).

⁴ *Petition* at 10-11.

⁵ “When an application is significantly defective, dismissal without prejudice serves the regulatory purposes of administrative efficiency and fairness to other applicants.” *Britz Fertilizers Inc., John Perez and Sons, Delta Container Corp, Rich Edwards, Todd Job, Manna Ranch Inc. d/b/a Acampo AG Services, California Waste Recovery System, Bill Stokes, JJ Rios Farm Services Inc., Joseph Beeler and Ronald Siveria d/b/a J.R. Laser Finishing For 900 MHz Trunked Business Station Licenses in California*, FCC File Nos. 0001055385-0001055386, 0001055390-0001055397, Order on Reconsideration, DA 04-786, 19 FCC Rcd 6819 at 6821, ¶4 (2004).

⁶ *Opposition* at 8.

public interest analysis and scrutinize the Applications to the exact degree required by law. To the extent that the Commission is truly concerned with administrative efficiency, it should not act on the Applications until they accurately identify the proper parties and authorizations in question.

II. GWTP is a “Party in Interest.”

The Applicants assert that “a claim of standing based *solely* on an alleged breach of contract is inadequate to meet the requirements of Section 309(d)” (emphasis added).⁷ However, nothing in Section 309(d) denies standing to a party engaged in a contract dispute with an applicant.⁸ Section 309(d) permits “[a]ny party in interest” to “file with the Commission a petition to deny any application. . . .” GWTP’s “interest” in this proceeding is quite tangible and direct – that the Commission’s approval of the Applications will adversely affect the outcome of GWTP’s legal dispute with SES Americom.⁹ Specifically, the litigation pending in Texas involves SES Americom’s breach of its agreement with GWTP according to which each party was to obtain specific Verestar assets.¹⁰ While that

⁷ *Id.* at 4.

⁸ See 47 U.S.C. § 309(d)(1). See *James Robert Meachem and June H. Meachem*, 12 Rad. Reg. 1427, 1429 (1955). The party must merely be “able to establish that a grant of the instant application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature.” See *Time Warner Entertainment*, 10 FCC Rcd 9300, 9302, ¶ 17 (1995) (quoting *Pinelands, Inc.*, 7 FCC Rcd 6058, 6063, ¶ 18 (1992)).

⁹ As GWTP explained in its Petition, the Commission’s continued review or authorization of the assignment to SES Americom of the Brewster and Cedar Hill Teleport licenses during the pendency of GWTP’s legal action against SES Americom for those very assets is likely to give the court the incorrect impression that the Commission has “signed off” on the proposed transaction, thereby prejudicing the resolution of GWTP’s contract and other claims against SES Americom. See *Petition* at 10.

¹⁰ SES Americom’s dispute of GWTP’s standing is remarkable, considering that Mission Holdings, Inc. (assignor to GWTP) and SES Americom were bidding jointly for the Verestar assets until the parties created their agreement, enabling SES Americom to submit the bid that concluded the auction. See *GWTP Investments, L.P. v. SES Americom, Inc.*, Civil Action No. 3-04CV-1383L, D. Tex., N.D.Tx., Complaint, attached to the *Petition*, at 4, ¶ 12.

matter remains before the Texas court, it is simply improper to include the Brewster and Cedar Hill Teleport licenses in the Applications, as SES Americom has no clear right to acquire them. Because GWTP is the party to which those licenses should be assigned, GWTP is a “party in interest” to this proceeding.

III. GWTP is Not Asking the Commission to “Insert” Itself Into a Contract Dispute, But Merely to Refrain from Prejudicing Pending Litigation.

GWTP is aware that the Commission considers itself to be “an inappropriate forum in which to bring contract claims” and that it normally will not adjudicate contractual matters that are better resolved in another forum.¹¹ But GWTP has not asked the Commission to resolve a contract claim. Rather, GWTP, like the Applicants, has suggested that the Commission “not involve itself in private contracting matters.”¹² GWTP has asked the Commission to permit the court in Texas to resolve the contract dispute between GWTP and SES Americom before continuing its review of the Applications with respect to the Brewster and Cedar Hill Teleport licenses. From GWTP’s perspective, a Commission decision to do otherwise – to approve the assignment of those licenses to SES Americom – would be tantamount to “inserting” itself in the contractual dispute.¹³

¹¹ *Opposition* at 5-6.

¹² *Id.* at 2.

¹³ Contrary to the Applicants’ assertion, the Commission’s 1994 decision to recast a petition to deny as an informal objection to a proposed transfer of control of an operating telecommunications company does not compel the Commission to ignore the practical realities and likely effects of this proceeding. *See MCI Communications Corp.* at ¶11.

IV. The Commission Has No Basis for Abbreviating Its Review of the Applications.

The Applicants claim that a declaratory ruling on the foreign ownership implications relating to the Verestar assets is not necessary because the Commission has previously approved SES Global's acquisition of other domestic assets.¹⁴ The Applicants admit that the Commission's prior approval would be necessary for an acquisition by SES Americom "involving different services" or a "material change" in the company's foreign ownership.¹⁵ However, the Applicants fail to explain why the Commission's prior approval is not necessary for the company to acquire additional domestic assets. Nowhere in the *GE/SES Global Order*¹⁶ or in the *SES Americom Columbia Order*¹⁷ did the Commission grant to SES Global the authority to acquire additional U.S. communications assets without further review.¹⁸ Presumably, the Applicants would have cited to such authority, if it did indeed exist. To the contrary, the Commission's practice of reviewing

¹⁴ *Opposition* at 7.

¹⁵ *Id.*

¹⁶ *General Electric Capital Corp., Transferors and SES Global, S.A., Transferees, Order and Authorization*, 2001 FCC LEXIS 5544 (IB/WTB 2001), *Supplemental Order*, 16 FCC Rcd 18878 (IB/WTB 2001) ("*GE/SES Global Order*").

¹⁷ Application of SES Americom, Inc. and Verestar, Inc. (DID), File No. SES-ASG-20040503-00672, Exhibit A, FCC Form 312, at 2. *See also* In the Matter of SES Americom, Inc. Applications for Modification of Fixed-Satellite Service Space Station Licenses and Columbia Communications Corporation, Application for Modification of Fixed-Satellite Service Space Station Licenses, File Nos. SAT-MOD-20021108-00204, SAT-MOD-20021108-00205, SAT-MOD-20021108-00206, SAT-MOD-20021108-00207, SAT-MOD-20021108-00208, SAT-MOD-20021108-00209, SAT-MOD-20021108-00210, SAT-MOD-20021108-00211, SAT-AMD-20021108-00215, SAT-STA-20011211-00127, SAT-MOD-20020628-00094, SAT-STA-20030613-00106, SAT-STA-20021121-00223, SAT-STA-20030610-00101, SAT-STA-20021121-00224, SAT-STA-20030410-00063, SAT-STA-20021002-00185, SAT-STA-20030506-00082, SAT-STA-20021025-00197, SAT-MOD-20021108-00216, SAT-MOD-20021108-00217, SAT-MOD-20021108-00219, SAT-AMD-20021108-00218, SAT-MOD-20020627-00095, SAT-STA-20011211-00131, DA 03-2683 18 FCC Rcd. 16589, 16589 at n.4. (rel. Aug. 15, 2003) ("*SES Americom/Columbia Order*").

¹⁸ *Petition* at 15.

closely the assignment of licenses and authorizations to foreign-controlled parties is well established.

- In *VoiceStream/DT*,¹⁹ the Commission found that post-merger, the German government would own a 45% equity interest; the Commission assumed that it also would hold *de facto* control. The Commission reviewed a substantial record on the issue of preferential access to capital and government subsidies before concluding that the relationships would not affect competition.²⁰
- In the *GE/SES Order*, the Commission not only studied the foreign government ownership implications of the proposed transaction,²¹ the Commission also considered in its public interest analysis the European Union's prohibition on government aid.²²
- In *Vodafone/Globalstar*,²³ the Commission approved a transfer of control to a large, diverse group of domestic and foreign shareholders, the largest of which was a publicly-traded Bermuda company with its principal place of business in, and its corporate governance dominated by nationals of, the U.S. Many of its foreign owners were limited partners with small equity and voting interests, and none were found to be affiliates of a foreign government.

¹⁹ *VoiceStream Wireless Corp., et al., Transferors, and Deutsche Telekom AG, Transferee, Memorandum Opinion and Order*, 16 FCC Rcd 9779 (2001) ("*VoiceStream/DT*").

²⁰ *Id.* at ¶¶ 60-65.

²¹ *GE/SES Global Order* at ¶¶ 26-29.

²² *Id.* at ¶36.

²³ *Vodafone Americas Asia, Inc., Transferor and Globalstar Corp., Transferee, Order and Authorization*, 17 FCC Rcd 12849 (IB 2002) ("*Vodafone/Globalstar*").

In these and similar cases, the record that the Commission reviewed and relied upon contained substantially more detailed information about the proposed ownership structure of the transferee or assignee and its owners than is present in this docket. Clearly it would be contrary to law and Commission precedent to gloss over this omission merely because SES Americom believes that such review is not necessary.²⁴

V. The Commission Must Weigh Carefully National Security Concerns.

The Applicants argue that GWTP's observation that the Commission must consider whether the transaction will present any national security, law enforcement, foreign policy or trade policy concerns²⁵ is somehow flawed because the "Applicants have been discussing network security issues with the relevant U.S. government agencies."²⁶ However, rather than discrediting GWTP's observation, the Applicants have acknowledged its importance. The Applicants state that "all national security and law enforcement issues have been vetted and addressed."²⁷ However, the Applicants fail to cite anything on the record or provide objective evidence to support this conclusion. It is not the Applicants, but the Commission, that is responsible for reaching this conclusion. It would not be appropriate for the Commission to merely accept the Applicants' assertion without proper record support.

²⁴ "[A] second review of SES Americom's foreign ownership would not be warranted under any circumstances." *Opposition* at 8.

²⁵ *See Petition* at 18-19.

²⁶ *Opposition* at 12.

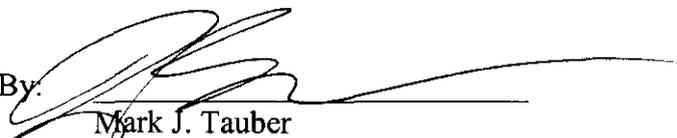
²⁷ *Id.*

VI. Conclusion

The Applicants oppose GWTP's Petition on the ground that the Commission should not insert itself into a contract dispute, yet they ignore the fact that the Petition requests that the Commission dismiss or deny the Applications specifically to avoid inserting itself into a contract dispute. The Applicants argue that the Commission should forego administrative efficiency and grant the Applications despite the fact that they do not accurately represent the parties to whom certain of the licenses should be assigned. The Applicants ask the Commission to ignore its obligation to review the Applications to the extent required by statute and regulation. The Applicants invite the Commission to take on faith much of the relevant information the Commission will need to adequately assess whether the transaction proposed in the Applications is in the public interest. The Commission should not accede to any of the Applicants' remonstrations. Instead, the Commission should dismiss or deny the Applications until the civil litigation in Texas has run its course or at least until the Applications correctly reflect the licenses that SES Americom has the contractual right to acquire.

Respectfully submitted,

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I, Evelyn Opany, hereby certify that a true and correct copy of the foregoing Petition to Dismiss or Deny was served this 12th day of July, 2004 via E-mail or U.S. Mail, First Class, postage pre-paid, to each of the following:

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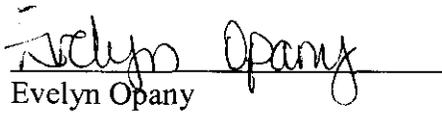
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